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No. 91-1765

In The

Supreme Court of the United States

October Term, 1991

BARBARA AUSTIN,

Petitioner,

vs.

SANDRA BERRYMAN, PATRICE JOHNSON, JOSEPH HAYES, AND RALPH CANTRELL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a Virginia statute that, on its face, prevents persons from receiving unemployment if they have left work solely in order to accompany a spouse to a new location offend the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY WRIT SHOULD BE DENIED 7

A. The federal constitution is not offended by a facially neutral statute that affords no showing of intentional invidious gender discrimination 7

B. The federal constitution does not require Virginia to pay unemployment compensation to claimants who quit work to accompany their spouses to a new location 10

C. The Fourteenth Amendment guarantees equal laws, not equal results, and the Virginia statute applies equally to all persons who voluntarily quit work to accompany a spouse 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Austin v. Berryman, 878 F.2d 786 (4th Cir.), en banc *cert. denied*, 493 U.S. 941 (1989) 2

Austin v. Berryman, 955 F.2d 233 (4th Cir. 1992) 2

Atonio v. Ward's Cove Packing Co., Inc., 827 F.2d 439 (9th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988) 12

Baker v. General Motor Corporation, 478 U.S. 621 (1986) 5

Branch v. Virginia Employment Comm'n, 219 Va. 609, 249 S.E.2d 180 (1978) 5

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 11

Dandridge v. Williams, 397 U.S. 471 (1970) 7, 8, 12

Flemming v. Nestor, 363 U.S. 603 (1960) 8

Ford Motor Co. v. Unemployment Compensation Commission, 191 Va. 812, 63 S.E.2d 28 (1951) 5, 6

Idaho Department of Employment v. Swith, 434 U.S. 100 (1977) 5

Klimko v. Virginia Employment Commission, 216 Va. 750, 222 S.E.2d 559 (1976) 4, 5

Ohio v. Hodory, 431 U.S. 471 (1977) 5

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 6, 8, 9, 12

South Carolina Education Assoc. v. Campbell, 883 F.2d 1251 (4th Cir. 1989) 10

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897) 11

Washington v. Davis, 426 U.S. 229 (1976) 7

Watkins v. Cantrell, 736 F.2d 933 (4th Cir. 1984) 4

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 12

Weinberger v. Salfi, 422 U.S. 749 (1975) 7, 8

STATUTES

STATE

Virginia Unemployment Compensation Act, Title 60.2 of the *Code of Virginia* (1950) 5

Va. Code Ann. § 60.2-618(1)(ii), (Michie Supp. 1991), (formerly § 60.1-58(a)(ii) 3, 7, 9

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Barbara Austin voluntarily quit her job as a laundress in Salem, Virginia in 1985. Her articulated reason for leaving employment was to relocate with her husband a distance of about 150 miles, which would preclude her usual employment. Austin was disqualified for the receipt of unemployment compensation because she voluntarily quit work without good cause.

Austin mounts a federal challenge to the disqualification statute, which explicitly states that relocating with one's spouse does not constitute good cause. Her challenge was initially threefold: that the statute infringed on

fundamental marital rights protected by the Fourteenth Amendment; that the statute burdened her First Amendment right to the exercise of religious belief; and that the statute is unconstitutional because it is gender based.

The fourth circuit *en banc*, concluded that petitioner's first two challenges were without merit, holding that geographical non-propinquity, and not religious belief or marital status, led to Austin's disqualification for unemployment benefits. *Austin v. Berryman*, 878 F.2d 786 (en banc), *cert. denied*, 493 U.S. 941 (1989). Moreover, the fourth circuit emphasized that *every individual* who follows such a course, whether for religious or nonreligious reasons, is disqualified for unemployment benefits. Likewise, the statute was upheld against Austin's equal protection/arbitrary classification and interference with marital rights claims.

In 1986, the district court reserved the equal protection/disparate impact claim and, on remand, upheld the statute against a claim of gender discrimination. The fourth circuit unanimously affirmed, concluding that the disqualification statute was facially neutral and had a legitimate economic purpose. *Austin v. Berryman*, 955 F.2d 233 (4th Cir. 1992).

The equal protection issue previously has been decided in the analogous contexts of public employment and social security benefits, and there is no split among the circuits. Further, the previously determined law of this case is that there is no fundamental right to unemployment benefits, and that the Virginia statutory scheme for qualification has a rational basis. *Austin v. Berryman*, 878 F.2d at 786.

Austin asserts that Va. Code Ann. § 60.2-618(1)(ii) (Michie Supp. 1991), [formerly § 60.1-58(a)(ii)], on its face and as applied to her, violates a federal right because it has an intended disparate effect on women and, presumably, denies Austin equal protection.

The challenged statute provides, in part:

> § 60.2-618. Disqualification for benefits. – An individual shall be disqualified for benefits upon separation from the last employing unit . . . :
>
> 1. . . . if the Commission finds such individual is unemployed because he left work voluntarily without good cause. As used in this chapter the term "good cause" shall *not* include (i) voluntary leaving work with an employer to become self-employed, or (ii) voluntary leaving work with an employer to accompany or to join his or her other spouse in a new locality. [Emphasis added.]

Since 1954, the Virginia Unemployment Compensation Act has disqualified individuals from the receipt of unemployment benefits if they voluntarily quit work without good cause. Since 1954, the standard for good cause has been "compelling and necessitous circumstances such as would leave one with no reasonable alternative but to leave employment." (App. at 1.)

In 1979, in an attempt to clarify the good cause standard, two factual circumstances were added to the statute as examples of non-compelling circumstances. These two circumstances were quitting one's job to become self-employed, and quitting one's job to move with a spouse to a new locality.

The primary reason for Austin's separation from her employment was her desire to immediately accompany her spouse in his relocation from Salem to Castlewood. Following the move, Mrs. Austin filed a claim for unemployment benefits which were to be charged to the tax account of her employer, McVitty House, Inc. McVitty House had a position available for Austin at all material times.

Unemployment compensation is a federal-state cooperative system funded by federal and state payroll taxes on private employers.[1] Under the federal-state cooperative system, benefits are provided as temporary financial assistance to those who become unemployed through no fault of their own. Very often, persons leave work for what Virginia recognizes as compelling and necessitous personal reasons. Among these are impaired health of one's dependents. In such circumstances, compensation would be paid provided that eligibility requirements are met. However, leaving work solely to accompany a spouse to a new locale is not a compelling and necessitous reason to hazard the risks of unemployment.

The purpose of any unemployment compensation system is to encourage employment, to maintain the stability of an available work force, and to provide temporary financial assistance to those persons who are

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[1] For general discussion of the joint federal-state venture in the unemployment insurance area, see *Steward Machine Co. v. Davis*, 301 U.S. 548, 574-75 (1937); *Watkins v. Cantrell*, 736 F.2d 933, 937-38 (4th Cir. 1984); *Klimko v. Virginia Employment Commission*, 216 Va. 750 n.1, 222 S.E.2d 559 n.1 (1976).

unemployed for reasons for which they are not responsible. *Branch v. Virginia Employment Comm'n*, 219 Va. 609, 611, 249 S.E.2d 180 (1978); *Ford Motor Co. v. Unemployment Compensation Commission*, 191 Va. 812, 63 S.E.2d 28 (1951). The Virginia Unemployment Compensation Act, Title 60.2 of the *Code of Virginia* (1950), as amended, provides a detailed and comprehensive system for the determination of benefits, based on factors that are manifestly related to these threefold purposes and are not dependent in any way upon gender.

In disqualifying from benefits persons who quit to move with a spouse, Virginia and other states have attempted to delineate a group of persons who do not fit within the category of those who find themselves unemployed through no fault of their own. This is a legitimate governmental objective. *Baker v. General Motors Corporation*, 478 U.S. 621 (1986).

Faced with an enormous demand upon limited resources, a state legitimately may seek to limit its unemployment trust fund expenditures. It is clear that Virginia has a legitimate and valid interest in preserving the fiscal integrity of its programs. *See, e.g., Ohio v. Hodory*, 431 U.S. 471 (1977); *Idaho Department of Employment v. Swith*, 434 U.S. 100, 101 (1977); *Klimko v. Virginia Employment Comm'n*, 216 Va. 750, 222 S.E.2d 559, 567 (1976). "The actuarial integrity of the Unemployment Trust Fund is important to employers whose tax payments finance it . . . . [T]o every covered employee presently or potentially entitled to benefits . . . the government has an interest in insuring that unemployed workers return to work as soon as reasonably practicable." *Klimko*, 216 Va. at 759, 222 S.E.2d at 567.

The statutory distinction drawn is between persons who voluntarily leave work to join spouses and persons who leave work for compelling and necessitous circumstances. Such distinction is not a pretext for gender-based discrimination. Neither class is uniquely male or female.

Correctly applying the test of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the fourth circuit found the Virginia statute to be gender-neutral, both overtly and covertly. "If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse affect reflects invidious gender based discrimination." *Feeney*, 442 U.S. at 274. Like the veteran hiring preference in *Feeney*, the Virginia statute supports legitimate legislative purposes. There is no evidence that the statute was devised *because*, collaterally, it would disqualify more women than men, or that its proponents sought to pay relocating male spouses but not relocating female spouses. To the contrary, a negative impact on women is neither inevitable nor an unavoidable consequence of the statute. The law remains what it purports to be; a qualification for persons who quit work for compelling reasons over those who quit work for lesser reasons of personal preference. *Ford Motor Co. v. Unemployment Compensation Commission*, 191 Va. 812, 63 S.E.2d 28 (1951).

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE FEDERAL CONSTITUTION IS NOT OFFENDED BY A FACIALLY NEUTRAL STATUTE THAT AFFORDS NO SHOWING OF INTENTIONAL INVIDIOUS GENDER DISCRIMINATION.

The fourth circuit did not err in failing to find constitutional defect or gender discrimination in Va. Code Ann. § 60.2-618(1)(ii) [formerly § 60.1-58(a)(ii)]. The statute is wholly neutral on its face in terms of gender. It is addressed and applies to "spouses." In *Weinberger v. Salfi*, 422 U.S. 749, 771-72 (1975), this Court clearly set forth the applicable standard for equal protection challenges arising in the area of economic and social welfare.

> [A] noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, Dandridge v. Williams [397 U.S. 471 (1970)], though of course Congress may not invidiously discriminate among such claimants on the basis of a "bare congressional desire to harm a politically unpopular group," U. S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973), or on the basis of criteria which bear no rational relation to a legitimate legislative goal.

Therefore, discrimination in social welfare and economic matters (such as unemployment compensation) is not unconstitutional absent invidious discriminatory intent. *Id.* at 772; *Dandridge v. Williams*, 397 U.S. 471 (1970). A violation of the Fourteenth Amendment requires intent to discriminate. *Washington v. Davis*, 426 U.S. 229, 239 (1976). It is well-settled that invidious discriminatory intent will not be imputed to a legislature.

Flemming v. Nestor, 363 U.S. 603, 617 (1960). If the classification is "rationally based and free from invidious discrimination", it satisfies both the equal protection clause of the Fourteenth Amendment and the due process requirement of the Fifth Amendment. *Salfi*, 422 U.S. at 770 (quoting *Dandridge*, 397 U.S. at 487).

Plaintiff's conclusory allegation of disparate impact is based on outdated sociological speculation and fails to establish the slightest nexus between the statutory disqualification and adverse impact upon a specific gender. The statute disqualifies men and women on precisely identical grounds – failure to have good cause for quitting. Only if a whole panoply of personal motivations are factored into the equation may it be alleged that women are more likely than men to quit for a particular reason that does not constitute good cause.

Austin is compelled to go far afield of the statute and must rely on her own stereotypical assumptions in order to conclude that there is intentional discrimination in the State's failure to subsidize personal relocation for all persons. Her assumptions, not the State's, are that only women, and not men, relocate without finding other work first, and that only women, not men, voluntarily give up their jobs to continue to cohabitate with a spouse. Today's demographics prove otherwise.

Nevertheless, even conceding for the purposes of argument that the disqualification provision has fallen more heavily on women, that result does not demonstrate invidious discrimination in enactment of the legislation. Austin is unable to overcome the controlling authority of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S.

256 (1979). At issue in *Feeney* was the constitutionality of a statute that conferred a preference for state civil service positions to veterans over nonveterans. This Court first noted that, like § 60.2-618(1)(ii) in the case at bar, the veteran's preference was not gender based. The term "veteran," like "spouse," was applicable to all persons, both male and female. *Id.* at 267-68. Furthermore, the fact that the law had an adverse impact on women in comparison to males did not establish a violation of equal protection. Feeney argued unsuccessfully that the consequences and impact of the statute for women were so inevitable that the legislature must have intended to discriminate against women. *Id.* at 278. Rebuffing this analysis, this Court held:

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 276 (citations omitted).

Similarly, there is no evidence that women were intentionally targeted for disqualification under the provision which, as shown by Austin herself, was rationally designed to alleviate economic pressures.

B. THE FEDERAL CONSTITUTION DOES NOT REQUIRE VIRGINIA TO PAY UNEMPLOYMENT COMPENSATION TO CLAIMANTS WHO QUIT WORK TO ACCOMPANY THEIR SPOUSES TO A NEW LOCATION.

The distinction between individuals who voluntarily leave work to join spouses and individuals who leave work for other purposes is not a pretext for gender-based discrimination. Neither class is uniquely male or female. In order to preserve the fiscal integrity of the unemployment trust fund and to limit benefits to those unemployed through no fault of their own, Virginia has sought to distinguish claimants solely on the basis of *why* they leave employment in a manner unrelated to gender.

These goals having been found legitimate, there is no evidence that the statute was enacted *because*, collaterally, it would disqualify more women than men. Austin, however, attempts to make out a case of invidious gender discrimination because one legislator responded to the economic interests of his constituency. Even if it were proper or feasible to inquire into the legislative motive or intent, no statements against relocating women may be divined therefrom.

Additionally, Austin cannot overcome *South Carolina Education Assoc. v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), in which the fourth circuit recognized and articulated the perils of judicial inquiry into legislative motive as a basis for divining unconstitutional motives behind facially neutral legislation. Such inquiry may be required in cases challenging statutes that are not facially neutral as is the

provision at issue. In the very limited cases where legislative motive is deemed relevant, more than a single illicit motivating factor is necessary to invalidate an otherwise constitutional statute. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . ." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). "It is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof . . . ." *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 318 (1897). There is no way of knowing why those, who did not speak, may have supported or opposed the legislation. The Fourteenth Amendment does not require the state to subsidize relocation decisions and to replace voluntarily forfeited wages at employers' expense.

C. THE FOURTEENTH AMENDMENT GUARANTEES EQUAL LAWS, NOT EQUAL RESULTS, AND THE VIRGINIA STATUTE APPLIES EQUALLY TO ALL PERSONS WHO VOLUNTARILY QUIT WORK TO ACCOMPANY A SPOUSE.

Austin has failed to raise a cognizable equal protection challenge. Disparate treatment may not be shown in the citing of a single raw statistic. Causation, a nexus between the operation of law and the disparity, must be shown. The entire pool of unemployment claimants must be looked at. If 86.8% of women claimants state that they quit work to follow their spouse and only 13.2% of men claimants give that reason, and the statute disqualifies all

who do not show good cause or compelling circumstances, then there is no denial of equal protection of the law. The law may and does reflect, rather than generate, societal trends. The Fourteenth Amendment guarantees equal laws, not equal results. *Feeney*, 442 U.S. at 273. "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Id.* at 272, *see also Dandridge*, 397 U.S. at 471.

It is not sufficient for Austin to cite the one statistic that of all claimants who are disqualified under the relocation statute, 86.8% are women. As noted by this Court in *Atonio v. Wards Cove Packing Co., Inc.*, 827 F.2d 439 (9th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988), the statistical disparity must be *caused* by a specific, identifiable practice or criteria of an employer or of the government.

In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 101 (1988), Justice O'Connor addressed the issue of causation in disparate impact cases and wrote, "We note that the plaintiff's burden in establishing a *prima facie* case goes beyond the need to show that there are statistical disparities . . . the plaintiff is, in our view, responsible for isolating and identifying the specific . . . practices that are allegedly responsible for any observed statistical disparities."

Where, as in the public benefits statute at issue, all claimants of both sexes are disqualified if they leave work solely to accompany a spouse to a new location, and any disparity is attributable to personal choices based on

factors outside of the state's control of manipulation, Austin's case must and should fail.

CONCLUSION

Because the fourth circuit's opinion correctly applies this Court's equal protection/disparate treatment jurisprudence and is not in conflict with any other circuit opinion, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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UNEMPLOYMENT COMPENSATION
COMMISSION OF VIRGINIA

Decision of Commissioner
VOLUNTARY LEAVING: 50
Attributable to or
connected with employ

In the Matter of Elsie F. Phillips, Claimant Interstate Claim – N. C. S. S. #224-05-7448 Dan River Mills, Inc. Danville, Virginia Employer	Appeal from Examiner Date of Appeal: June 2, 1955 Date of Hearing: June 13, 1955 Decision No.: RC02-01 Date of Decision: June 15, 1955 Place: Richmond, Virginia

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This is a matter before the Commission on appeal by the claimant from the decision of the Examiner (No. IS-1165-1163) dated May 24, 1955.

ISSUES

(1) Did the claimant voluntarily quit her employment without good cause?

(2) Has the claimant been available for work during the week or weeks for which she claims benefits?

This cause came on as a review of the transcript of the evidence taken before W. F. Renfrow, Appeals Deputy of the North Carolina Employment Security Commission, at Raleigh, North Carolina on May 9, 1955, and upon the transcript of the evidence taken before E. L. Calleer, Appeals Examiner of the Unemployment Compensation Commission of Virginia, in Danville, Virginia on April 21, 1955, and upon additional evidence presented by the claimant at her hearing before the Commission in Richmond, Virginia on June 13, 1955.

FINDINGS OF FACT

Claimant's last employer was Dan River Mills, Inc., Danville, Virginia where she worked from July 28, 1954 through March 4, 1955. She has been employed, off and on, by Dan River Mills since 1932. At the time of her separation she was employed as a spinner on the third shift at an average rate of $1.40 an hour.

Claimant left her employment with Dan River Mills in order to seek work in Forest, North Carolina where her aged parents reside. Claimant's mother and father are 80 and 88 years old respectively and are feeble, practically blind, and in necessitous circumstances. Claimant has moved into the home of her parents in order to minister generally to the physical and financial needs of her parents.

Since moving to Wake Forest she has applied for work with the only textile mill in Wake Forest and has also applied to a textile mill in Raleigh, North Carolina some twenty-three miles from Wake Forest, as well as another six miles from Wake Forest. She has also contacted several groceries, two furniture stores, a cleaning establishment, and a five and ten cent store in her efforts to locate employment. She placed no restrictions on the wage for which she was willing to work, the type of work she was willing to accept, nor the hours she was willing to work.

At the time of her hearing before the Commission the claimant had succeeded in securing permanent employment on the third shift at Royal Cotton Mills in Wake Forest.

OPINION

In the opinion of the Commission this claimant has demonstrated that she was desirous of obtaining suitable employment and she made an active and unrestricted search of the labor market in which she is residing in an effort to locate such work. She was eventually successful in obtaining employment on the third shift and is presently working as a spinner at a wage substantially lower than she has earned while in the employ of Dan River Mills. The Commission is convinced of the claimant's good faith in earnestly endeavoring to locate suitable employment and concludes that she was available for work during the weeks for which she claimed benefits.

The only other issue raised in this appeal is whether or not this claimant should be disqualified under the

provisions of §60-47(a) for having voluntarily left work without good cause.

This Commission has discussed the meaning of "good cause" as used in §60-47(a) on numerous occasions. It has been pointed out in those decisions that §60-47(a) at one time prescribed a disqualification if a claimant was "unemployed because he left work voluntarily without good cause *involving fault on the part of the employer*". Subsequently, however, the General Assembly amended §60-47(a) so as to delete the underscored language. Since this amendment the Commission has consistently recognized purely personal reasons, where such reasons are of a compelling nature, as constituting "good cause" for voluntarily leaving work. The rule most commonly accepted by administrative tribunals construing statutes similar to §60-47(a) has been that a reason which would cause a reasonable person, desirous of retaining his employment, to relinquish his job would constitute "good cause".

Therefore, where the pressure of real, not imaginary substantial, not trifling, reasonable, not whimsical, circumstances compel the decision to leave employment, the worker leaves voluntarily but with good cause. The pressures of necessity, of legal duty, or family obligations or other compelling circumstances, and the worker's capitulation to them, will not penalize his right benefits if he once again re-enters the labor market.

The claimant in this case relinquished her job at Dan River Mills which she describes as a "good job" in order to assist with the care of her aged parents. The need for

her services and presence in their home is clearly established in the record. The family physician recommended it and the claimant left her job and accepted another which paid less in order to render a filial service which was sorely needed. This, the Commission deems, was not only commendable but was compelling and to the extent that she had good cause for leaving.

DECISION

For the reasons stated above the decision of the Appeals Examiner is affirmed in part, reversed in part. The claimant is hereby declared available for work from March 15, 1955 to June 6, 1955 the date on which she went to work. No disqualification should be imposed under §60-47(a).

/s/ John Q. Rhodes, Jr.
John Q. Rhodes, Jr.,
Commissioner